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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LOUIS WOZNIAK,

Petitioner,

v.

THOMAS F. CONRY, WILLIAM R. SCHOWALTER, LARRY R. FAULKNER, JAMES J. STUKEL and MICHAEL T. AIKEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL R. CORNYN
Counsel of Record
WILLIAM R. BRINKMANN
THOMAS, MAMER & HAUGHEY
Attorneys for Respondents
P.O. Box 560
30 East Main Street
Champaign, Illinois 61824-0560
(217) 351-1500

167024

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF FACTS

Petitioner is a tenured associate professor in the Department of General Engineering, within the College of Engineering, at the University of Illinois. In fall semester 1994, petitioner taught an undergraduate course section in general engineering, GE 103, a required course for many engineering majors, and a section of GE 222, also for undergraduate students. Teachers in the Department of General Engineering were required to submit grade books for review within the Department. This policy was designed to assure uniformity and consistency of grading practice and teaching within the Department and across all sections of each course. At the end of the semester, petitioner did not turn in his grade books for his section of GE 103, nor did he provide complete grading information for four students who had received a failing grade in his section of GE 222.

Subsequently, the Dean of the College of Engineering, respondent William R. Schowalter, formed the judgment that petitioner's conduct was interfering with and frustrating the Department's educational mission. After considering the actions of the petitioner, policy concerns and the input from the faculty on issues raised by petitioner's non-compliance with the policy, Dean Schowalter decided to assign and did assign petitioner duties other than teaching undergraduates beginning in the fall semester of 1995. Petitioner maintained his salary, his tenure and his rank as associate professor. The petitioner sued his Department Head, his Dean, the Vice-Chancellor/Provost, the Chancellor and the President of the University.

The controversy that led to this lawsuit began early in 1995, following the close of the 1994 fall semester. When

petitioner did not comply with the policy, his Department Head, respondent Thomas Conry, by letter dated February 3, 1995, ordered the petitioner to turn in the grade books immediately. Petitioner did not comply with this directive and his non-compliance was brought to the attention to Associate Dean Roscoe Pershing on February 7, 1995. Conry considered petitioner's conduct to be a breach of his duty as a faculty member and insubordinate. Conry told petitioner so in a letter dated February 21, which was copied to Dean Schowalter. Petitioner was informed that the breach of his duties and his insubordination would "be considered in determining your teaching assignments, making decisions to withhold permission to charge expenses against Departmental Faculty Fund allocations, and the evaluation of your performance for salary purposes." By letter of February 24, Conry made more explicit each of his warnings of February 21 and specifically told him:

> Your teaching assignments for at least the next year will be changed. You will not be teaching GE 222 or GE 324. There is grave uncertainty about how you are treating your students and until there is full disclosure by you on this matter, plus a review of that information by the Executive Committee of the Department, you will not be considered to teach a class where you set the grading policy.

Dean Schowalter appointed Associate Dean Pershing to decide the dispute over the grade books and petitioner was informed of this on May 19. Petitioner responded on May 30 by informing the Associate Dean that the petitioner had asked respondent Chancellor Aiken to review this dispute along with other disputes that the petitioner had brought to

the Chancellor. On June 20, Chancellor Aiken declined to overrule previous decisions made on the issues presented to him by the petitioner. The Associate Dean wrote to the petitioner on June 23 and requested that the petitioner turn the grade books in to him, together with any relevant explanations. Petitioner did not submit the requested grade books to the Associate Dean. The Dean's action followed.

Petitioner argued to the trial court that he was effectively stripped of all of his teaching, research and service duties. The appellate court assumed this to be true, thus avoiding petitioner's arguments that the trial court had improperly weighed evidence on summary judgment. However, the trial court found that petitioner's position was not supported by the evidence on summary judgment and, further, that the respondents were entitled to qualified immunity on the due process issues. Respondents submitted, in support of their motion, exhibits which included: a letter dated May 1, 1995, from petitioner to Vice Chancellor and Provost Larry R. Faulkner, also a respondent here, in which petitioner acknowledged the requirement that grade books be submitted to the Department; a memorandum from petitioner to various administrators within the College indicating that the petitioner had assumed his position as coordinator of the College's World-Wide Web pages; a memo to petitioner from an Associate Dean, dated September 13, 1995, indicating that the College had provided a budget to support the petitioner's activities, in contradiction to the implication of petitioner's affidavit which claimed he was given no support; and, memoranda from the petitioner outlining the petitioner's activities for the 1995-96, 1996-97 and 1997-98 school years. The memoranda reflect, among other things, that he had advised a master's degree student, had papers accepted for publication, had submitted proposals for a web-operated

laboratory, had advised undergraduates, had conducted his duties as coordinator of the College's Web site, had developed a 300-level course and a 400-level course that were advertised and scheduled to be taught by him, and, that he had been active in various committees and had engaged in private consultation. The trial court relied upon facts contained in documents submitted by petitioner and in documents authored by petitioner but submitted by respondents in its order granting summary judgment.

THE DECISION BELOW

Petitioner claims that his substantive due process right to teach was taken from him arbitrarily and capriciously and that he was denied procedural due process rights in the taking. He also claims these rights were taken in retaliation for the exercise of claimed First Amendment rights. In the trial court, petitioner lost his due process claims by summary judgment; his First Amendment claim was lost on a motion to dismiss. Both decisions were affirmed by the Seventh Circuit Court of Appeals. The Seventh Circuit, putting aside the findings of the trial court as indicated above, assumed that petitioner had been deprived of all teaching duties, barred from all research, and effectively shuttled to an administrative staff position. The court held that petitioner had no substantive due process right to teach without following the University's grading rules. The court held that there was no procedural due process violation for two reasons. First, petitioner had been given several opportunities to present his side of the issue and had spurned them. Second, petitioner did not dispute that he had refused to produce the grading materials for review and there were no material facts in dispute that required an evidentiary hearing. Finally, on the First Amendment claim, the court held that petitioner could not

assert the claimed privacy right of his students and that petitioner's publication of his dispute with the administrators did not convert the decision to remove him from teaching duties from a reaction to behavior to a retaliation for speech about the behavior.

REASONS FOR DENYING THE WRIT

Petitioner presents an argument here on the procedural due process issue that he did not present to the trial court or to the Seventh Circuit. Here, he claims a denial of his procedural due process right because he had already been punished once and did not realize he would be punished again. Neither the fact of the previous "punishment" nor argument concerning the legal consequences of that punishment, is presented in the briefs of the parties before the Seventh Circuit, although exhibits (the letters of February 21 and 24, 1995) upon which the argument here is premised are contained in the record. The procedural due process argument presented to the trial court and the appellate court did not raise an issue of two punishments but rather dealt solely with petitioner's asserted right to a hearing and the alleged failure of respondents to give him one.

On the substantive due process issue, petitioner asserts that there is a split of authority between the First Circuit and the Seventh Circuit. The "split," if there is one, is not particularly germane to the resolution of this case. Moreover, the Sixth Circuit case upon which petitioner relies, *Newman v. Massachusetts*, 884 F.2d 19 (1st Cir. 1981), was decided sixteen years before the decision of this Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997), upon which the Seventh Circuit relied.

On his First Amendment theories, petitioner claims a split between the Sixth Circuit and the Seventh Circuit on an asserted academic freedom right of grading students. He also claims that his publication of the grading issue was protected speech. There is no split of authority. Petitioner's claim of protected speech fails on his allegations and well-developed law.

There is no issue presented that requires review by this Court.

A. Procedural Due Process

As to petitioner's claim of a procedural due process violation, there does not appear to be any novel ground for the opinion of either the trial court or the Court of Appeals. Petitioner does not contest that he refused to follow the grading policy. He had several opportunities to be heard on the issue. He cites no law that requires any more of an opportunity than he was given by the Department Head and the Associate Dean to explain himself. His argument that he was punished twice was not presented to the trial court or the Appellate Court and should not be considered here. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S 206, 212-13 (1998).

The argument is also factually misleading. In his Petition, petitioner cites the letter of February 24 only for the proposition that he was told expenses would not be reimbursed and his salary review would be affected. Petitioner leaves out of his statement of facts that he was told then that he would not be assigned to teach in a course in which he set the grading policy until he met his responsibility and the grading materials were reviewed.

Petitioner knew that the problem was not yet resolved. He knew the Associate Dean had been appointed to decide the problem, he asked the Chancellor to intervene, and he was told to produce the grading material to the Associate Dean. All of this occurred after the "discipline" by the Department Head failed in its intended purpose to have the grade books produced for review. Petitioner had all the process he was due. There is no reason for review.

B. Substantive Due Process

The asserted split on substantive due process rights between the Seventh Circuit in this case and the First Circuit in *Newman v. Massachusetts*, 884 F.2d 19 (1st Cir. 1981) is marginal. The *Newman* court held that plaintiff's property interest in her job triggered a substantive due process right to be free of arbitrary and capricious decision-making, based upon prior decisions of that court, while at the same time recognizing that the Supreme Court had not yet addressed the issue. 884 F.2d at 24-25. In the case below, the Seventh Circuit held that the petitioner did not have a substantive due process right to teach without following the lawful policies of the university on grading. Citing *Washington v. Glucksberg*, 521 U.S. 702 (1997), the court held that substantive due process applied only to fundamental civil rights and petitioner had not identified one on these rights. The split between the Circuits, according to petitioner, is in the holding that substantive due process rights are not implicated in an employment contract governed by the procedural due process clause.

Washington v. Glucksberg holds exactly what the Seventh Circuit said it did — that substantive due process protects only fundamental rights and liberty interests. None

of the cases cited in *Washington v. Glucksberg* hold that a property interest in a job implicates substantive due process. While, as petitioner notes, *Conn v. Gabbert*, 526 U.S. 286 (1999) recognizes some application of substantive due process in an employment case, the right is subject to reasonable regulation. The cases in which it might be more clearly applied are where a statute or regulation result in "a complete prohibition of the right to engage in a calling. . . ." 526 U.S. 291-92.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court cited *Glucksberg* and *Daniels v. Williams*, 474 U.S. 327 (1986) for the proposition that the substantive due process clause would bar "certain government action regardless of the fairness of the procedures used to implement them." 523 U.S. at 840. This Court then addressed the test to be applied for a substantive due process analysis of an executive rather than legislative action. "Arbitrariness," as a constitutional matter, must be tested by a "shocking to the conscience" standard with such "conduct intended to injure in some way unjustifiable by any government interest." 523 U.S. 847-49. The principles of *Washington v Glucksberg* and *County of Sacramento v. Lewis* do not seem applicable to arguments over a protected property interest governed by procedural due process.

In this case, the court below also acknowledged both the university's and the students' "powerful interests" in comparability of grades. That fact coupled with petitioner's refusal to follow the grade book policy indicates that the decision made by the Dean was neither trivial, unrelated to the educational mission, nor without basis in fact. Even if this test of the *Newman* court would be applied here, a test far from certain given this Court's decisions sixteen years

later in *Washington v. Glucksberg* and *County of Sacramento v. Lewis* the decision reached is supported by the record. There is no need of review.

C. First Amendment Retaliation

In his amended Count III, petitioner alleged that respondents demanded that he produce "all of the underlying data and information pertaining to the grading of all of the students instructed by the petitioner" for reasons unknown to petitioner. He then alleges that respondents retaliated against him for his refusal to provide that information and because he posted "correspondence and other documentation on the door of his office" which related to this dispute and because he informed students of the controversy "so that each student individually could make a determination as to whether he or she wished to have his or her grade data revealed." Finally, petitioner alleged that he had a duty to protect the students' "right of privacy" and that his refusal was protected under principles of "academic freedom."

The trial court found that the collection of grading information on the students was an administrative matter "well within Respondent's authority" and therefore not protected by petitioner's right of academic freedom. The court cited *Parate v. Isibor*, 868 F.2d 821, 828-29 (6th Cir. 1989) for the proposition that the university has oversight authority over student grades. Thus, as to the academic freedom allegation, the court dismissed the complaint.

Oversight of the grading of students is particularly within the ambit of the educational mission of the university as carried out at the department level by the Department Head.

In matters of the educational mission, the university judgment should be given great deference by the federal courts. *See, e.g., Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985). Petitioner alleges that he was asked to provide to his Department Head all information regarding the grades of the students taught by the petitioner. On its face, this would seem to be a reasonable request by a Department Head of a teacher in his department. Nonetheless, petitioner pleads that he refused to produce the information to the Department Head and that he claimed that this information was protected by students' alleged right of privacy and his own right of academic freedom.

Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989), the case cited by the petitioner as the source of this right of academic freedom as it relates to grading, deals with the assignment of a grade to a student as activity protected by academic freedom of the professor. *Parate* held that a school cannot tell a teacher what grade to assign but it also recognized that the university itself could assign a grade to the student and even alter the professor's grade. 868 F.2d at 827-28. The court stated: "Although the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades not to assign." 868 F.2d at 828. (But see, *Brown v. Armenti*, __ F.3d __, 2001 WL 388752 at *4 (3d Cir. 2001), holding that the "university professor does not have a First Amendment right to expression via the school's grade assignment procedures.") Petitioner's reliance upon *Parate* to support his refusal to allow departmental review of his grading is quite misplaced and there is certainly no conflict between *Parate* and the decision below. This case does not present an academic freedom issue.

Petitioner also complains of the holding below that petitioner had no standing to assert the alleged rights of students to privacy of their grades vis-à-vis the university. However, *Conn v. Gabbert*, 526 U.S. 286, 292-93 (1999), a case cited by petitioner, recites the rule that a petitioner must assert his own legal rights and cannot rest his claim to relief upon the rights of another.

Nor does petitioner buttress his claim that disclosing the grade book to the Department violates a student's right of privacy. Petitioner cites no case and respondents are aware of no cases that hold that a student has a right of privacy in his grades as against the university. The university has authority over the curriculum and content of courses as well as over the grading policies. *Brown v. Armenti*, __ F.3d __, 2001 WL 388752 at *4 (3d Cir. 2001). *Parate*, as indicated above, noted that the university has a right of review and can even change a professor's grade. Petitioner's citation to *Stern v. Shouldice*, 706 F.2d 742 (6th Cir. 1983) is inapposite if cited for the proposition that a teacher's refusal to follow Departmental grading policy is protected activity. *Stern* did not deal with grades or grading but rather with a professor's advising a student to seek legal help with a suspension.

Petitioner may be relying on *Stern* to argue that his advising students of his unsupported claim that the students had a right of privacy as against the university administration and advising them of the dispute with the Department over the grade books is protected activity. This bootstrapping argument was specifically rejected by the court below. Petitioner refused to follow the policy and when the dispute escalated, he publicized it to his students by posting "correspondence and documents" related to this dispute on his door. This dispute does not appear to be an issue of public

interest but rather an internal dispute over the right of the Department Head to review information concerning the grading of petitioner's students. It was simply a refusal by petitioner to follow legitimate policy.

The Department Head made a reasonable request that the petitioner turn over his grading material for review. Petitioner openly defied his Department Head and his Dean on a matter of policy. As the appellate court held, it was his actions, not his speech, that caused the decision of which he now complains. There is no issue raised in petitioner's First Amendment count that warrants review by this Court.

CONCLUSION

For the foregoing reasons, respondents Thomas F. Conry, William R. Schowalter, Larry R. Faulkner, James J. Stukel and Michael T. Aiken, by their attorneys, Thomas, Mamer & Haughey, pray that this Court will deny the Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL R. CORNYN
Counsel of Record
WILLIAM R. BRINKMANN
THOMAS, MAMER & HAUGHEY
Attorneys for Respondents
P.O. Box 560
30 East Main Street
Champaign, Illinois 61824-0560
(217) 351-1500